STATEMENT
OF
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BEFORE THE
SUBCOMMITTEE ON POLICY, RESEARCH AND INSURANCE
OF THE
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U.S. HOUSE OF REPRESENTATIVES

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Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify concerning the impact of hazardous waste cleanup liability on the insurance industry. The focus of my testimony is on those aspects of EPA's Superfund enforcement program which are relevant to insurance issues.

Summary of Major Points

The central emphasis of EPA's Superfund enforcement program is on increasing the proportion of cleanups undertaken by private parties. In fact, at the direction of EPA Administrator Reilly in his Superfund Management Review, the Agency has brought an "enforcement first" philosophy to the Superfund program. Using a broad range of administrative and legal enforcement tools provided by the Superfund statute, the Agency has made

substantial progress in reaching its objectives in this regard. Typically, when private parties clean up a site, the government is largely made whole. The Agency also has met with success in obtaining cash payments "up front" from liable parties in satisfaction of EPA's cost recovery claims.

The Agency has had little involvement in issues relating to whether insurance coverage is available to liable parties. We view coverage issues as questions of private contract interpretation governed by state law. Where we have participated in litigation involving insurance issues, we have proceeded judiciously and where it was necessary to do so to protect the interests of the United States. We expect that this will continue to be our approach.

Overview of Superfund Authorities and Enforcement Program

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") in 1980, and amended it by the Superfund Amendments and Reauthorization Act of 1986 ("SARA") (together, "Superfund" or "CERCLA"), primarily to strengthen the government's authority to deal effectively with the problems of the release of hazardous substances, pollutants and contaminants into the environment. The statute authorizes EPA to take direct "response" actions to abate actual or threatened releases of hazardous materials, and created the

Hazardous Substance Superfund to pay for the federal government's response actions. CERCLA also empowers the United States to seek injunctive relief from a court or issue administrative orders to abate an imminent and substantial endangerment caused by the release of hazardous substances. Finally, CERCLA authorizes the government to bring cost-recovery actions against responsible parties to recover funds that the government has spent in performing response actions.

In section 107 of CERCLA, Congress identified which parties are liable under the statute. They include, generally, current facility owners and operators; facility owners and operators at the time of disposal; transporters of hazardous substances who select the disposal site; and generators of hazardous substances.

The courts have found that liability under CERCLA is strict and, where harm is indivisible, joint and several. It has been our experience that this liability scheme is a critical part of the Superfund enforcement program. Joint and several liability serves as an effective incentive to enlist private parties in the enforcement process. It also encourages responsible parties to work together to negotiate cleanup agreements with the government.

The Superfund liability scheme also allows responsible parties to bring other liable entities into the process through

contribution actions, and ultimately assures that all viable parties potentially responsible for the site will share the costs of cleanup. Many responsible parties prefer to settle with the government for cleanup or costs, due in part to the exposure joint and several liability provides.

The government's enforcement program proceeds from two fundamental premises. First, that sites should be cleaned up as quickly as possible, utilizing appropriate priority schemes; and second, that those who are responsible for contamination should pay to clean it up.

Therefore, the Superfund enforcement program is designed to provide maximum incentives for responsible parties to come forward promptly to clean up the hazardous waste sites in which they have been involved. The thrust of the program is to lead private parties to negotiate and come to terms with EPA in the first instance, and so avoid prolonged litigation to compel private parties to clean up sites or repay the government its cleanup costs.

Under the statute and the standard of joint and several liability, the government considers any responsible party a candidate for inclusion in a response or cost recovery action which the United States may institut . Our objectives are to obtain from responsible parties a complete site cleanup or 100%

of response costs.

Dimensions of the Cleanup Problem; Enforcement Results

The scope of the cleanup problem that CERCLA is intended to address is enormous. The National Priorities List (or "NPL"), EPA's list of the potentially most serious sites, includes about 1,200 sites today, and is projected to list about 2,100 sites in the year 2000.

The overall cost of remediating an NPL site is estimated for planning purposes today to average $29 million per site. This figure includes, among other things, expenditures for site discovery and investigation; hazard ranking and listing on the NPL; sampling efforts and laboratory analysis; investigation of appropriate remedies; and technical assistance to those involved in cleanup actions; as well as the actual on-site remedial response itself. This estimate does not include, among other things, enforcement costs or indirect costs, such as those for program support, or operation and maintenance of remedies.

Through the efforts of the EPA and the Department of Justice, the United States has been successful in obtaining private party cleanups of hazardous waste sites. Our preliminary estimates show that, through enforcement settlements and orders,

the value of commitments EPA has obtained to date for cleanup work by responsible parties totals about $3.9 billion. Costs recovered to date for cleanup actions undertaken by the United States total about $432 million. So far in fiscal year 1990 alone, we have obtained commitments for work or cost reimbursement worth almost $860 million, or about 20% of the total. In fiscal year 1989, we obtained commitments for work or cost reimbursement worth over $1.1 billion. EPA's preliminary projection for overall responsible party contribution to Superfund for fiscal year 1990 through fiscal year 1993 -- that is, commitments by responsible parties for work and cost reimbursement -- ranges from $4.2 billion to $4.9 billion.

Superfund Enforcement as it Impacts Insurers

Historically, the government's participation in litigation involving insurance for response costs has been limited. There are both legal and practical reasons for this.

The Superfund enforcement program is achieving significant recoveries. In particular, we are making very substantial progress in meeting our objective of significantly increasing the proportion of cleanups undertaken by private parties.

The Agency has largely left questions concerning the extent to which insurance coverage will fund Superfund cleanups to

private parties to resolve. The Agency believes it is a matter of state law whether or not potential or actual Superfund liabilities trigger insurance coverage. The question whether an insurer is required to indemnify its insured against Superfund liability turns on the interpretation of the private insurance contract entered into by those parties; typically, the Comprehensive General Liability ("CGL") insurance policy is the instrument used to protect commercial entities against various types of liability. Although CERCLA provides that certain categories of parties are to be held liable for hazardous substance contamination, the statute leaves the interpretation of insurance policies to state law. No special rules apply when construing insurance policies merely because the underlying liability arises as a result of CERCLA.

Therefore, the dimensions of the impact of CERCLA liability on insurers will be determined by state and federal judges, as they interpret state laws in private contract disputes between insurers and their insureds over the coverage of CGL or other relevant policies. These disputes often will concern the meaning and scope of the so-called "pollution exclusion" clauses found in many CGL policies since the early 1970's, by which insurers have sought to limit the coverage of their policies, or will turn on the legal construction of other terms in the private insurance contract. The law on these issues is unsettled in most states, and coverage inescapably turns on interpretation of individual

policies and the factual circumstances underlying the coverage claim.

EPA believes it has been judicious in its approach to insurance coverage issues. Indeed, since CERCLA's enactment, the United States's participation in litigation involving insurance for response costs has been quite limited.

Among the hundreds of Superfund enforcement cases handled by the Agency, in only five instances has the United States participated in litigation addressing the availability of insurance for CERCLA remediation. On three of those occasions the United States has participated as an amicus curiae in cases involving coverage for environmental remediation in order to express our views on matters of insurance contract interpretation.

In Continental Insurance Cos. v Northeastern Pharmaceutical & Chemical Co. ("NEPACCO"), No. 84-5034-CV-S-4 (W.D. Mo. 1985), the insurer had sought a declaratory judgment that there was no liability insurance coverage under the CGL policies at issue for response costs which the government sought to have reimbursed by the insured, NEPACCO. The government participated as an amicus curiae in the appeal of the district court's decision, which found that the government's response costs do not fall within the coverage of the CGL policies at issue. The government as amicus

argued that response costs, incurred by the government pursuant to CERCLA and sought to be recovered from NEPACCO, constitute "damages" under Missouri law within the meaning of the CGL policies at issue in that case, an so come within the coverage of those policies. The U.S. Court of Appeals for the 8th Circuit, in Continental Insurance Cos. v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO"), 842 F.2d 977 (8th Cir. 1988), held that "damages" do not include CERCLA response costs.

The United States also filed an amicus curiae brief in the Jones Truck Lines v. Transport Insurance Co., No. 89-1729 (3d Cir., April 17, 1990) Cert. Question to Mo. S. Ct., No. 72650, in order to urge the Missouri Supreme Court to rule on a similar question under Missouri law: whether Superfund cleanup costs expended directly by the insured in a government-mandated cleanup are covered as "damages" under standard form CGL policies. Jones Truck Lines ("Jones") purchased a site in Missouri on to which NEPACCO's dioxin-containing waste had been sprayed. Jones cleaned up the site and brought an action against its insurer to recover its cleanup costs. The government as amicus informed the Missouri Supreme Court of its belief that the Eighth Circuit incorrectly interpreted Missouri state law to exclude Superfund remediation costs from coverage within the terms of such policies as those at issue in the NEPACCO litigation.[1]

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[1] In July, 1990, the Missouri Supreme Court issued an order by which it declined to accept the question certified by the Jones Truck Lines court on the ground that the Missouri statute

The Missouri insurance law question is crucial to the United States' ability ultimately to recover fully a judgment in a related case, United States v. Bliss, 667 F. Supp. 1298 (E.D. Mo. 1987), which held Independent Petrochemical Corporation (IPC) liable for response costs incurred by the government at six dioxin sites in Missouri. The response costs sought in Bliss amounted to more than $1.5 million. The United States' response costs for all the dioxin sites in Missouri are much higher.

IPC currently is engaged in litigation with its insurer concerning insurance coverage for this liability, and the Missouri state law issue is central to the disposition of this litigation. (See Independent Petrochemical Corp. v. The Aetna Casualty & Surety Co., C.A. No. 83-3347 (D.D.C. 1988), appeal pending, No. 89-5368 (D.C. Cir).) The government recently filed an amicus brief in the IPC litigation similarly urging that the Missouri law question be certified to the Missouri Supreme Court.

While legal theories may exist under particular state laws for the government to pursue insurers by way of subrogation or assignment of rights, these avenues have rarely been used, especially since they involve, primarily, state court proceedings interpreting questions of state law. Under the principle of

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authorizing certification of the question to the Missouri Supreme Court is unconstitutional under the Missouri State Constitution.

subrogation, if an insured responsible party defaults on its CERCLA obligations under a court judgment or consent decree, the government may have authority under state law to succeed to the insured's rights under its policy against its insurer.

One case in which the government has exercised such rights arose in connection with the NEPACCO litigation. As NEPACCO's judgment creditor, the United States initiated a garnishment action in the district court for the Western District of Missouri against the Continental Insurance Company seeking the insurance proceeds which were the subject of the Continental Insurance Cos. v. NEPACCO coverage dispute.[2] This action ultimately was dismissed pursuant to the Eighth Circuit's decision that NEPACCO was not entitled to coverage.

As to our experience with assignments, we are aware of one case in which the United States has accepted assignments of insurance claims pursuant to settlements with responsible parties. In United States v. Baird & Mcguire et al., No. 83-3002-4 (D. Mass. 1983), the United States received $900,000 from the insured responsible party and, as part of the settlement, accepted assignment of the responsible party's insurance claims

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[2] The garnishment action, United States v. Continental Insurance Cos., No. 85-3069 (W.D. Mo. 1985), was brought pursuant to Section 379.200, Mo. Rev. Stat., which provides that a judgment creditor is entitled to bring suit in equity against the judgment debtor and its insurers if the judgment is not satisfied within thirty days of being rendered.

against Ambassador Insurance Company in settlement of approximately $2.5 million in past response costs and significantly greater anticipated future costs. Recently we reached a settlement with Ambassado in a Vermont proceeding pursuant to which the carrier is undergoing dissolution.

The government also has had some experience in Superfund enforcement litigation with insurers of responsible parties who decide themselves to participate in settlement negotiations and in settlements. This too has occurred infrequently, and the government has not isolated this category of activity for special monitoring.

To conclude, it continues to be our intention to leave the evolution of insurance law to its traditional forum -- the state courts and legislatures. Our overarching goals under CERCLA are to secure private party cleanups and to recoup as much as possible for the Fund. Cost allocation issues, including insurance coverage, are properly left largely to the private sector to work out among the various interests in the state courts.

I appreciate your consideration of our testimony, and would be happy to answer any questions you may have.